United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1124,25

B Pgs

To be argued by
THOMAS P. SMITH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 75-1124, 75-1125

UNITED STATES OF AMERICA,

Appellee,

—v.—

HOWARD M. BRONSTEIN and
DOUGLAS P. PENNINGTON,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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Statement of the Case

A Grand Jury sitting at Hartford returned a single count indictment on July 19, 1974, charging appellants Howard Bronstein and Douglas Pennington with possession with intent to distribute approximately 240 pounds of marihuana in violation of Title 21, United States Code, Sections 812 and 841(a)(1). That substance was seized during a warrantless search of their luggage conducted subsequent to appellants' arrest at Bradley International Airport on July 6, 1974.

Appellants moved to suppress this evidence. A hearing was held in the District Court on October 21st and 22nd, 1974. On November 5, 1974, the Honorable T. Emmet Clarie denied appellants' suppression motion. The District Court's ruling, adopting the Government's proposed findings of facts and conclusions of law, is reprinted in full in appellant's appendix, A-7 through A-24.

On January 9, 1975 both appellants pleaded guilty to the indictment, reserving the right to appeal the District Court's November 5th ruling.[1] Shortly thereafter, appellants were each sentenced to four months imprisonment and two years probation.

Questions Presented

I. Did The District Court Err In Determining That There Was Probable Cause For Appellants' Warrantless Arrest And The Subsequent Warrantless Search To Which Appellants Consented?

II. Did The District Court Err In Holding That The Use Of A Marihuana-Sniffing Dog To Detect The Probable Presence Of Marihuana Concealed In Baggage Located In A Public Airport Was Neither A Search Nor Unreasonable, But Was Merely One Step In Establishing Probable Cause For Appellants' Arrest?

III. Is The District Court's Finding (That Appellants' Post-Arrest Consent To An Immediate Warrantless Search Of Their Baggage Was Freely And Voluntarily Given) Clearly Erroneous?

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[1] The procedure of pleading guilty, while reserving the right to appeal an adverse suppression ruling, has previously been approved by this Court. See *United States* v. *Rothberg*, 480 F.2d 534, 535 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); *United States* v. *Doyle*, 348 F.2d 715, 719 (2d Cir. 1965); *United States* v. *Faruolo*, 506 F.2d 490, 491, n.2 (2d Cir. 1975) (Mulligan, *J.*). See also, *United States* v. *Burke*, — F.2d — (2d Cir. 1975), slip opinion 3572-3573 (Friendly, *J.*). In the instant case, as in *Burke*, the Government expressly consented to this procedure with the approval of the District Court.

The Facts

On Saturday morning, July 6, 1974, Special Agent Wayne Drew of the Hartford Office of the Drug Enforcement Administration (hereafter DEA) was telephonically contacted by Special Agent Edward McCrady of the San Diego, California, office of the DEA (Tr. 10-11).[2] McCrady informed Drew that two American Airlines ticket agents, whom McCrady had found to be reliable in the past (Tr. 14), provided him with information about two individuals who had purchased tickets that morning for American Airlines Flight number 10, bound for Bradley International Airport in Windsor, Connecticut (Tr. 11).

McCrady advised Drew that, when purchasing the tickets, the two individuals acted as though they were total strangers but, shortly thereafter, were seen conversing as though they were "old friends" (Tr. 10-11, 13). McCrady further advised Drew that at the time the tickets were purchased each individual checked-in two, large, new and heavy suitcases, each of which was approximately the same size, shape, and weight, and each of which was equipped with a combination lock (Tr. 13, 16). In addition to providing a description of the two individuals and their luggage, McCrady also advised Drew that the names under which the tickets were purchased were "B. Drake" and "H. Braun" (Tr. 11, 20).

Upon receipt of this information, Agent Drew contacted "Troop W," a special unit of the Connecticut State Police permanently stationed at Bradley International, to ascertain whether a police dog trained to detect marihuana would be present there when flight number 10 arrived (Tr. 14-15). After being advised that Trooper John Foley, and the police dog "Meisha," would be at the airport at 8:00 A.M., Drew

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[2] References marked "(Tr.)" refer to the transcript of proceedings held in the District Court on October 21 and 22, 1974.

contacted Agent Dale Seymour, also of the Hartford Office of DEA, and together drove to Bradley Field (Tr. 14-16).

Shortly before flight number 10 arrived, Agent Seymour, Trooper Alden Ringklib, Trooper John Foley, and the police dog "Meisha," stationed themselves in the luggage unloading area of the terminal building (Tr. 16-17). Simultaneously, Agent Drew stationed himself, together with Troopers Robert Ness and John Jacoby, on the other side of a partition in the luggage claim area of the terminal (Tr. 17-18).

After flight number 10 landed, the luggage from the airplane was placed by airline personnel onto baggage carts, and then onto a conveyor belt, which returns luggage to awaiting passengers (Tr. 105-106). Approximately 50 pieces of baggage was placed on the conveyor belt, Trooper Foley permitted "Meisha" to walk alongside the belt and sniff all 50 pieces of baggage (Tr. 66, 97).

Of the approximately 50 pieces of baggage on that flight, "Meisha" reacted positively to two pieces: a new, large yellow suitcase with a combination lock (Gvt. Ex. 4); and a new, large blue suitcase, with a multi-colored stripe, and a combination lock (Gvt. Ex. 3) (Tr. 97-98). Agent Seymour and Trooper Foley witnessed "Meisha" pay particular attention to, and actually bite, both of these suitcases (Tr. 66, 97). Seymour and Ringklib then advised Drew, Jacoby, and Ness, who were stationed on the opposite side of the partition separating the unloading and claim areas, of "Meisha's" reaction to the two bags (Tr. 18).

At about this time, Drew, Ness, and Jacoby saw two men whose description coincided with that given to Drew by Agent McCrady (Tr. 17-18). These men were the only ones who matched the descriptions McCrady had supplied (Tr. 11, 18, 38).

Moments later, Agent Drew saw one of these men, later identified as Howard Bronstein, walk to the conveyor belt and pick up the blue striped suitcase to which "Meisha" had positively reacted (Tr. 19-20, 97-98). At that time Drew also saw the same man pick up a large maroon suitcase (Gvt. Ex. 2) (Tr. 19-20). The man then departed the terminal building. Shortly thereafter Drew and Seymour together observed the second individual, later identified as Douglas Pennington, pick up two large, yellow suitcases (Govt. Exs. 1 and 4), one of which (Gvt. Ex. 4) had also previously been bitten by "Meisha" (Tr. 20, 70), and begin to leave the terminal building.

Agents Seymour and Drew thereupon approached appellant Pennington. The agents asked whether his name was "B. Drake" and whether the suitcase he was carrying belonged to him. Pennington replied affirmatively to both inquiries (Tr. 20-21). At this point Pennington was placed under arrest by Agent Seymour and was taken upstairs to the offices of "Troop W" in the company of Seymour, Foley and Ness (Tr. 21-23).

In the meantime, Agent Drew and Trooper Ringklib pursued Howard Bronstein, who was found standing in a rent-a-car parking area adjacent to the terminal building. Drew asked Bronstein whether his name was "H. Braun" and whether he owned the two bags he was carrying. Bronstein similarly replied affirmatively (Tr. 21, 22). At this point he was asked to accompany Drew and Ringklib to "Troop W" offices in the terminal building (Tr. 22).

Once inside "Troop W," both defendants were placed under arrest, Pennington for the second time, and advised of their rights (Tr. 23, 71). Although Pennington advised the agents that he would not give a statement until he had first consulted with a lawyer, prior to that time both he and defendant Bronstein admitted their true names and commented to the agents, "Well you have us now; it is all

over" (Tr. 23, 24). Thereafter, having been advised of their rights (Tr. 23, 71), and having been specifically and unequivocally told by the agents that they did not have to say anything without consulting with an attorney (Tr. 56), both defendants asked Agents Drew and Seymour how long they would be in custody (Tr. 25).

At this point, in response to appellants' own inquiry, Drew and Seymour explained the procedure that normally follows an arrest (Tr. 25, 27, 28), together with the necessity for Drew and Seymour obtaining a search warrant to open their suitcases (Tr. 25). The agents further explained that the Magistrate before whom the appellants would have to be arraigned would set bond (Tr. 25). Agent Drew also advised them that he and Seymour would attempt to secure a search warrant from the Magistrate, who was then vacationing in Niantic, Connecticut, in the event they chose not to consent to an immediate opening of the bags (Tr. 31-32).

Agent Seymour, also in response to appellants' inquiry, explained that the agents would have to locate the Magistrate in order to obtain a warrant, and would then have to drive back from Niantic in order to execute it (Tr. 87). Both agents stated that, if appellants chose to cooperate, they could begin cooperating by opening their bags.

The appellants, at this juncture, requested the opportunity to speak privately (Tr. 26). Agents Drew and Seymour not only permitted them to be alone, but imposed no time limitation on how long they could speak privately (Tr. 76). As a result, appellants were left alone together for approximately 15 minutes (Tr. 26, 75). At the end of their private conversation, the appellants asked to speak to the agents (Tr. 26, 27).

At this point, appellants stated that they would consent to an opening of their luggage if the agents would guaran-

tee that they be released without bail (Tr. 77). The agents rejected appellants' offer, explaining that bail is set exclusively by the Magistrate and is dependent on a number of factors over which the agents have no control (Tr. 76-77). Drew and Seymour did, however, state that they would view consent as a form of cooperation and would make that cooperation known to the Magistrate (Tr. 77).

Appellants ultimately asked the agents if they would be willing to recommend a non-surety bond to the Magistrate in return for their consent to the immediate opening of their luggage (Tr. 60). This arrangement, which was proposed by the appellants, and not the agents, was agreed to by Agents Drew and Seymour (Tr. 60).

Bronstein and Pennington thereupon provided Drew and Seymour with the combinations to their locked suitcases (Tr. 34-35). When unlocked, the suitcases were found to contain approximately 240 pounds of marihuana and mothballs (Tr. 39). Mothballs were placed in the suitcases to disguise the odor of marihuana, thereby avoiding detection (Tr. 79).

Appellants were promptly arraigned before United States Magistrate Thomas F. Parker at his summer home in Niantic (Tr. 80), where, in fulfillment of the promise exacted from them by the appellants, Drew and Seymour recommended that they be released on their own recognizance (Tr. 81). Magistrate Parker ultimately released them under a non-surety bond (Tr. 143).

At no point during this entire transaction did either of the agents, or the State Troopers, who assisted them, have their weapons drawn; act discourteously; use physical or verbal abuse; claim that a warrant was unnecessary; or pretend already to have a warrant (Tr. 24, 26, 74, 82, 83). And, contrary to appellants' claim, at no point subsequent to Douglas Pennington's reference to legal counsel did any agent, State or Federal, either "continue to interrogate"

the appellants, or imply that the appellants were obligated to talk to them without benefit of counsel (Tr. 56). Rather, from the moment of their arrest until their release by the Magistrate the agents simply responded truthfully and candidly to appellants' numerous questions and, ultimately, acquiesced to the conditions which appellants *themselves* attached to their consent (Tr. 60).

I.

The agents had ample probable cause to arrest appellants and to search their bags.

Contrary to appellants' contention, the government does not claim that the information provided by Agent McCrady in itself supplied probable cause for their arrest. But the government does submit that this information, *coupled with* the positive reaction of "Meisha," a police dog specially-trained to detect the presence of marihuana, most clearly did supply probable cause both to arrest the individuals who claimed the bags, and to obtain a warrant to search those bags.

Agent McCrady's status as a law enforcement officer carries with it a presumption of reliability. See *United States* v. *Ventresca*, 380 U.S. 110, 111 (1965); *United States* v. *Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972); *United States ex rel. Cardaio* v. *Casscles*, 446 F.2d 632, 637 (2d Cir. 1971); *Maclean* v. *Trainor*, 365 F.Supp. 695, 698 (W.D.Pa. 1973). McCrady in turn advised Agent Drew, a fellow law enforcement officer, that the ticket agents were "extremely reliable;" that they had provided information in the past; and that their information had previously turned out to be correct (Tr. 14). The fact that Drew and Seymour did not directly speak to the ticket agents, but instead received their information through Agent McCrady, is unimportant, for hearsay clearly may be used to estab-

lish probable cause. *Maclean* v. *Trainor, supra; United States* v. *Geldon,* 357 F.Supp. 735, 737 (N.D. Ill. 1973); *United States* v. *Markan,* 356 F.Supp. 742, 745 (N.D. Ohio 1972).

The observations of the ticket agents merely constituted the first of three layers of information possessed by Drew and Seymour at the time of appellants' arrest. These observations were both detailed and specific. The ticket agents not only described the race, age, height, weight, and clothing of both individuals (Tr. 11), but also described all of the bags as having combination locks and being of the same size and weight (Tr. 13, 16). They further indicated that the appellants had purchased their tickets separately under the names "Braun" and "Drake," each of which surname was prefixed by a first initial (Tr. 20). Finally, the ticket agents indicated that, although appellants appeared to act as total strangers when purchasing their tickets, they were later seen conversing as though they were "old friends" (Tr. 10-11, 13).

The second layer of information was provided by the positive reaction of "Meisha" to two of the approximately 50 pieces of baggage unloaded from flight number 10. Agent Seymour witnessed "Meisha" actually bite Government's Exhibits 3 and 4 (Tr. 97-98), and then communicated this information to Agent Drew prior to appellants' arrest (Tr. 18).

"Meisha" has been used by the Connecticut State Police in numerous investigations at Bradley Field and has participated in over thirty training exercises (Tr. 94-95, 96). Although "Meisha" has been deceived in the sense that she has occasionally *failed* to detect marihuana, in each and every instance in which "Meisha" *has reacted* positively to

baggage, that baggage has later been found to contain marihuana (Tr. 96).[3]

The third, and final, layer of information was supplied to Drew and Seymour when they observed the appellants, the only two individuals in the airport whose description matched those provided by McCrady (Tr. 11, 18, 38), pick up four large suitcases with combination locks, two of which moments earlier had been attacked by "Meisha" (Tr. 19, 20, 70).

Probable cause is a common sense of concept. It is the functional equivalent of "reasonable grounds," and must be determined "on factual and practical considerations of everyday life . . . ." *United States ex rel. DeNegris* v. *Menser*, 247 F. Supp. 826, 830 (D. Conn. 1965), *aff'd*, 360 F.2d 199 (2d Cir. 1966). "Only a probability of criminal activity . . . ," *United States* v. *Gimelstob*, 475 F.2d 157, 160 (3d Cir. 1973), "and not a prima facie showing . . . ," *United States* v. *Mulligan*, 488 F.2d 732, 736 (9th Cir. 1973), is required to establish probable cause. See, e.g., *United States* v. *Harris*, 403 U.S. 573 (1971); *Jones* v. *United States*, 362 U.S. 257 (1960); *Draper* v. *United States*, 358 U.S. 307 (1959); *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949); *Raffone* v. *Adams*, 468 F.2d 860 (2d Cir. 1972);

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[3] Appellants' argument that "Meisha" is only accurate 50% of the time because she failed to detect the presence of marihuana in two of their four suitcases misperceives the issue. The issue is whether "Meisha's reaction, coupled with the other information to Drew and Seymour, supplied probable cause to believe that the bags *which were attacked* contained marihuana. The evidence developed at the suppression hearing establishes, contrary to appellants' argument at p. 23 of their Brief, that "Meisha" has *never* attacked a bag later found *not* to contain marihuana. The dog, therefore, has a 100%-accuracy rate, not a 50% rate as appellants claim. Since "Meisha" did, in fact, attack two of the suitcases, the agents were fully justified in assuming the *probable* existence of marihuana in Government's Exhibits 3 and 4.

United States v. *Jiminez-Badilla*, 434 F.2d 170 (9th Cir. 1970). It is, as the Supreme Court has stated:

> "the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers. We weigh not individual layers but the 'laminated' total. It has often been repeated, but bears repetition that 'in dealing with probable cause, * * * as the very name implies, we deal with *probabilities*. These, are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act.' *Brinegar* v. *United States, supra*, 338 U.S. at 175, 69 S.Ct. at 1310, 93 L.Ed. 1879. (Emphasis added)." *Smith* v. *United States*, 358 F.2d 833, 837 (D.C. Cir. 1966).

Moreover, it makes no difference whether each of the various layers considered separately is consistent with innocence if, considered together, the "laminated total" indicates the probability that a crime is being committed. See *Hernandez* v. *United States*, 353 F.2d 624, 628 (9th Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966).

The government respectfully submits that the "laminated total" of the information possessed by Agents Drew and Seymour unquestionably provided them with probable cause both to arrest appellants and to obtain a warrant to search their baggage,[4] and the District Court was clearly correct in so holding.

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[4] The testimony developed at the suppression hearing further indicates that *but for* appellants' consent, which is treated in Part III, *infra*, Agents Drew and Seymour would have obtained a warrant.

II.

The use of a dog to detect the odor of marihuana in the air surrounding appellants' suitcases was not a search.

Appellants contend that the use of "Meisha" to detect the odor of marihuana in the air surrounding their suitcases constituted an unreasonable search. In so doing, they urge this Court to accept essentially the same argument that was raised, and rejected, in *United States* v. *Fulero*, 498 F.2d 748 (D.C. Cir. 1974). In that case a dog known as "Chief" was used to detect the odor of marihuana emanating from a footlocker in a bus terminal. In a *per curiam* opinion the Court properly disposed of this argument in the following terms:

> "The appellant contends that Chief's sniffing of the air around the footlockers was an unconstitutional intrusion into the lockers. *We think the argument is frivolous.* The appellant also contends that there was no probable cause for the issuance of the search warrant. We think there was ample probable cause and that the conduct of the police was a model of intelligent and responsible procedure." *Id.* at 749 (Emphasis added).

The government submits that *Fulero* is sound and should be followed by this Court for all of the following reasons.

A. Smelling the odor of marihuana in a public place is analogous to sighting contraband "in plain view."

In *United States* v. *Johnston*, 497 F.2d 397 (9th Cir. 1974), and *United States* v. *Martinez-Miramontes*, 494 F.2d 808 (9th Cir. 1974), the Court applied the "plain view" doctrine of *United States* v. *Harris*, 390 U.S. 234, 237 (1967), to factual situations in which narcotics agents

themselves detected the odor of marihuana emanating from the respective appellants' property. Although the present case is distinguishable from *Johnston* and *Martinez-Miramontes* in that here the odor of marihuana was smelled by "Meisha," this distinction is not critical.

The function of "Meisha" was simply to assist Agents Drew and Seymour in detecting the odor of marihuana. By her reaction, the agents knew that the odor of marihuana surrounded two of appellants' four suitcases. "Meisha," in sum, aided Drew and Seymour in detecting an odor exposed in the air in essentially the same way as a flashlight aids law enforcement officers in exposing what is otherwise, but for the darkness, in plain view. It is settled that the use of an instrument such as a flashlight or binoculars does not under these circumstances constitute a search. See, e.g., *United State* v. *Lee,* 274 U.S. 559, 563 (1927); *United States* v. *Hood,* 493 F.2d 677, 680 (9th Cir. 1974); *Williams* v. *United States,* 404 F.2d 493, 494 (5th Cir. 1968).

B. The use of "Meisha" entailed neither a physical intrusion into appellants' bags nor a violation of any reasonable, justifiable expectation of privacy outside of those bags.

Contrary to appellants' suggestion, the government does not maintain that there can be no search in the absence of a "physical intrusion" into a given area. What the government does claim, however, is that in the present case there was neither a "physical intrusion" into appellants' bags, nor an interference with any legally cognizable, reasonable expectation of privacy which appellants were entitled to maintain outside of those suitcases.

"Meisha" at no time entered appellants' suitcases, nor did she even sniff the air contained within them. Rather, her function was confined exclusively to detecting the odor of marihuana in the air outside appellants' bags and, by her reactions, communicating her findings to the agents.

Hence, there was no "entry" or "physical intrusion" within the meaning of *United States* v. *Katz*, 389 U.S. 347 (1967).

The fact that "Meisha" ultimately bit two of appellants' four suitcases subsequent to her detecting the odor of marihuana in the air around them does not, the government respectfully maintains, transform the prior odor detection process into a search. If anything, the biting of the suitcases constituted a mere technical trespass. It is well settled that a subsequent technical trespass in no way taints, or renders inadmissible, a prior lawful observation:

> "The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches. For aught that appears, the cases of liquor were on deck and, like the defendants, were discovered before the motor boat was boarded. Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution. Compare *Hester* v. *United States*, 265 U.S. 57. *A later trespass by the officers, if any, did not render inadmissible in evidence knowledge legally obtained. McGuire* v. *United States*, 273 U.S. 95." *United States* v. *Lee*, 274 U.S. 559, 563 (1927), (Brandeis, *J.*) (emphasis added).

Although *Lee* antedates *United States* v. *Katz*, *supra*, it was relied upon in *Katz* itself, *see* 389 U.S. at 351, and has been applied in numerous post-*Katz* decisions. See, *e.g.*, *United States* v. *Artieri*, 491 F.2d 441, 446 (2d Cir. 1974); *James* v. *United States*, 418 F.2d 1150, 1151, n.1 (D.C. Cir. 1969). It is still "good law."

Relying on *United States* v. *Solis*, — F. Supp. — (C.D. Calif. 1975), 43 U.S.L.W. 2425 (April 22, 1975), appellants also claim that "Meisha's" use in the present case violated their "expectations of privacy." The government respectfully submits that this Court should reject that argument

and, rather than following *Solis*, should follow *United States* v. *Fulero*, 498 F.2d 748 (D.C. Cir. 1974).

In *United States* v. *Martinez-Miramontes*, 494 F.2d 808 (9th Cir. 1974), the Court held that the defendant had relinquished his reasonable expectation of privacy *by his act* of placing an "odorous weed" in a place from which he could expect the odor to escape into public exposure. Although the odor in that case was smelled by a police officer, rather than a dog, the Court determined the scope of defendant's expectations by focusing not on the particular means by which the odor was detected, but rather upon the actions of the defendant himself. Also see *United States* v. *Johnston*, 497 F.2d 397 (9th Cir. 1974). The government submits that the appellants, like the defendant in *Martinez-Miramontes*, also relinquished their expectation of privacy in the air surrounding their baggage when they placed over 200 pounds of marihuana in four suitcases which they knew were destined for a public building. The government also submits that the presence of mothballs in those suitcases should be viewed as evidence that appellants clearly contemplated the escape of this odor and its possible detection by drug agents assisted by specially-trained dogs. The government, in short, maintains that *Solis* conflicts with the law of its own Circuit by indulging in the precise type of "'hairsplitting' constitutional distinctions" that *Martinez-Miramontes, supra,* condemns. *Id.* at 810.

Even if it were assumed that appellants truly had a subjective expectation of privacy in the air surrounding their suitcases, and the government submits there is no basis for such an assumption, it is clear that *Katz* requires something more before Fourth Amendment protections attach. *United States* v. *Fisch*, 474 F.2d 1071 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973), indicates that *Katz* contemplates only the protection of reasonable and justifiable expectations. In determining whether a particular expectation is justifiable and reasonable, several criteria should be considered.

> "The 'place' though its ownership or possession no longer controls, remains as an element for our consideration under the *Katz* ruling. We consider, as well, the non-trespassory origin of the information received, the absence of artificial means of probing, with their potentialities for the wide-spread dissemination of total revelation, the gravity of the offense involved, here the smuggling of contraband. The type of information received from the aural surveillance is a factor to be considered in attempted delineation of the limits of what society can accept given its interest in law enforcement, whether society can reasonably be required to honor that expectation [of privacy] in all cases. The degree of probable cause before us is high, there being reasonable cause for the police to believe that the room in question was being used in aid of a criminal venture." *Id.* at 1078 (footnotes omitted).

While the marihuana possessed by the defendant in *Solis* was concealed in a private housetrailer, hence arguably possessing the same "special character of intimacy" that surrounds a hotel room, *United States* v. *Fisch*, *supra*, here appellants' marihuana was stuffed into suitcases knowingly placed into the hands of a public bailee and destined for a public place. There was no artificial probing of appellants' baggage and no possibility of widespread and indiscriminate dissemination of the information that "Meisha" obtained by sniffing the air around them. Unlike cases involving magnetometers, in which a technological device may be triggered by a totally innocuous metallic object of minute proportions, see, *e.g.*, *United States* v. *Albarado*, 495 F.2d 799 (2d Cir. 1974), or cases involving electronic listening devices which expose the substance of all conversation, criminal or otherwise, see, *e.g.*, *United States* v. *Katz*, *supra*, the present case involves the limited use of a dog which is trained to detect the odor of only one substance, the very possession of which is a crime.

On the basis of the foregoing, the government submits that the use of "Meisha" violated no reasonable expectation of privacy which appellants were entitled to maintain.

III.

The District Court correctly found that appellants freely and voluntarily consented to opening the bags without requiring the agents to obtain a warrant.

Contrary to the impression created by appellants, the government most certainly does dispute their version of the "facts." As a matter of fact, the government disputes practically each and every factual assertion in Part V of their brief. Moreover, the agents themselves, who testified before the District Court, also disputed appellants' assertions. There was a conflict of credibility in the Court below, and that conflict was resolved in the agents' favor. The precise issue before this Court is whether the findings of the District Court, before whom the agents and the appellants testified, are "clearly erroneous." *United States* v. *Boston*, 508 F.2d 1171, 1179 (2d Cir. 1974); *Mullins* v. *United States*, 487 F.2d 581, 589 (8th Cir. 1973); 8 Moore's Federal Practice (Cipes), para. 41.09, n. 8. The government submits that the Court's findings, which mirror its views as to the various witnesses' credibility, are not only not "clearly erroneous," they are clearly correct and should be accorded great weight by this Court. See *United States* v. *Bracer*, 342 F.2d 522, 524-525 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965); *Drummond* v. *United States*, 340 F.2d 983, 988 (8th Cir. 1965); *United States* v. *DuShane*, 435 F.2d 187, 192 (2d Cir. 1970); *United States* v. *Callahan*, 439 F.2d 852, 861 (2d Cir.), *cert. denied*, 404 U.S. 826 (1971).

A. The District Court correctly found that the agents did not use their power to recommend bond as a tool to coerce appellants' consent.

The thrust of appellants' argument, which was squarely rejected by the District Court, is that Agents Drew and Seymour ignored their "adamant" requests for legal counsel and threatened that if they did not consent to a warrantless search the agents would: (1) not take them before a magistrate until the following Monday (Tr. 135); (2) would ensure that they were locked up with "niggers," "queers," and "faggots" (Tr. 87, 135, 148); (3) and would recommend a $25,000 full-security bond (Tr. 135-136, 162). Drew and Seymour denied threatening to refuse to take appellants before the magistrate (Tr. 51-52, 57, 89), and the District Court found that they testified truthfully (Finding No. 56). Drew and Seymour denied threatening appellants with being incarcerated with "niggers," "queers," and "faggots" (Tr. 87, 52), and the District Court found that no such threat was made (Finding No. 55). The agents similarly denied threatening to recommend a high bond in the event appellants failed to consent (Tr. 84, 58, 59-60), and the District Court found that no such threat was, in fact, made (Find No. 53).

It is true, and the government does not dispute that, Drew and Seymour agreed to recommend a non-surety bond if appellants did consent. But the testimony developed at the suppression hearing establishes that it was the appellants, and not the agents, who proposed this. Conspicuously absent from appellants' brief is any reference to the following:

By Mr. Smith:

> Q. Which way was it, Agent Drew? Did you say to the Defendants "We will recommend a non-surety bond if you open up the suitcases", or was it this

way: "We will open up the suitcase if you will recommend a non-surety bond"?

Was it the former or the latter?

Mr. Slitt: I object to that, your Honor. I think he is leading the witness, and I think the agent already testified exactly what he said, and what transpired. He is suggesting. . . .

The Court: I suppose it is a logical alternative there. At least we have three alternatives, and there are only two here—why don't you ask him who made the proposal, who initiated the proposal? Who stated it?

The Witness: In the course of our explaining what we wanted in the way of cooperation, we always explain to everybody that the thing we want most out of someone when he is arrested is cooperation, in the sense of introducing an agent to another individual, for the purpose of making a buy.

We explained that there are other things that we like a Defendant to do in the way of cooperation, initially. And we explained that one of them would be their cooperation, that it would be their cooperation, that it would begin, by opening the bags.

They asked us if they agreed to open the bags, would we recommend a non-surety bond? And that's what we told them we would do.

The Court: In other words, they proposed it?

The Witness: Yes, sir. They were very concerned about getting out of there that day (Tr. 59-60).

On the basis of the foregoing, the District Court found, and properly so, that the issue of bond was tied to the

issue of consent exclusively by the appellants (Finding No. 52).[5]

As the government observed in its brief to the Court below, it simply defies common sense to suggest that two experienced federal law enforcement agents who, moments earlier telephonically contacted both their group supervisor and the ODALE prosecutor in order to ensure that their actions complied with the law (Tr. 31), would then coerce from the appellants permission to proceed without a warrant for which they so clearly had probable cause to obtain. This is especially so where, as here, the agents had to take the appellants before a magistrate anyway in order to be arraigned (Tr. 36). The District Court's ruling stands in recognition of this fact.

B. The agents did not ignore appellant Pennington's request for counsel before making a statement and did not continue to "interrogate" either appellant after that point.

The record indicates that after appellant Pennington said he did not want to talk to the agents about the case until he had first talked with a lawyer, both appellants were told that they did not have to do so. As Agent Drew testified,

> "we, in turn, indicated that they didn't have to talk to us without consulting an attorney" (Tr. 56).

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[5] As Agents Seymour and Drew testified below, the object of most drug investigations is to detect the source of the narcotics in question. By acquiescing to appellants' request, the agents placed them in a position where they could, if they desired to cooperate further, introduce undercover officers to the source of their supply. This could not be done if they were incarcerated (Tr. 91-93). Moreover, the evidence indicates that the agents fully complied with the condition that appellants attached to their consent: they did, in fact, recommend that appellants be released on a no-surety bond (Tr. 81).

Moreover, the record indicates, and the District Court found, that appellants, contrary to their claim, never demanded an attorney.[6] As Agent Seymour testified:

> "They didn't request an attorney, per se, saying 'I want to speak to my lawyer'; they just said 'We really don't want to say too much now, until we talk to a lawyer.'
>
> Then they asked us if they could be alone to discuss the matter between themselves" (Tr. 73).

Despite being told that they did not have to talk to the agents about their case, and having been fully warned of their rights (Tr. 23, 71), appellants questioned the agents at length about such matters as how they had been caught (Tr. 72); how long their processing would take (Tr. 25); what procedure would be followed (Tr. 25); what bond they would receive and how bond would be determined (Tr. 27, 76). The agents simply responded truthfully to appellants' numerous inquiries, indicating during the course of their response that they desired the appellants' cooperation. At no point did the agents engage in "intensive questioning"; at no point did they ignore appellants' request for counsel; and at no point thereto did they continue to "interrogate" them.

In essence, appellants claim that their rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were violated and, relying on *United States* v. *Fisher*, 329 F. Supp. 630 (D. Minn. 1971), argue that this alleged violation vitiates their consent. The government denies that appellants' *Miranda* rights were violated. The government also dis-

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[6] *See* Finding No. 72. In making this finding, the Court rejected appellants' claims that a lawyer was "adamantly" requested. The Court also found that appellants testified *incredibly* in other respects and that this lack of candor was entitled to consideration in evaluating appellants' testimony *in toto*. *See* Finding No. 68.

putes the appellants' conclusion that a violation of *Miranda* invalidates an otherwise free and voluntary consent.

United States v. *Fisher* antedates *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). The *Bustamonte* Court clearly indicated that *Miranda* is designed to protect Fifth Amendment rights, which are vastly different from fourth amendment rights. *Id.* at 241. In line with this, in *United States* v. *Faruolo*, 506 F.2d 490 (1974), this Court held:

> "The argument that *Miranda* warnings are a prerequisite to an effective consent to search is not at all persuasive. The contrary was implicit in *United States* v. *Mapp, supra,* 476 F.2d at 76-79, where no *Miranda* warnings were given, and explicit in *United States* v. *Kohn, supra,* 365 F. Supp. at 1034. There is no possible violation of Fifth Amendment rights since the consent to search is not 'evidence of a testimonial or communicative nature.' *Schmerber* v. *California,* 384 U.S. 757, 761, 86 S. Ct. 1826, 1830, 16 L.Ed. 2d 908 (1966)." *Id.* at 495.

The testimony in the District Court indicates that appellants were clearly informed that the agents were obligated, in the absence of consent, to obtain a search warrant, and that agents clearly stated that they planned to obtain one (Tr. 25, 32). Thereafter, appellants were permitted to speak alone together with no time limitation imposed on them (Tr. 26, 75, 76). As a result of this conversation, appellants agreed to permit the agents to open their bags without the necessity of first obtaining a warrant. Having received the benefit of their bargain, appellants should not now be permitted to undo an otherwise valid consent by claiming that they thought their fifth amendment rights had been ignored, when it is clear that they were fully advised of their fourth amendment right to require a search warrant. See *United States* v. *Scheiblauer,* 472 F.2d 297, 301 (9th Cir. 1973).

C. The totality of the circumstances supports the District Court's ruling.

Whether consent is free and voluntary "is a question of fact to be determined from the totality of circumstances." *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 227. Although the consent search in *Bustamonte* occurred prior to arrest, the same standard applies in post-arrest consent situations. *Id.* at 228. Also see, *United States* v. *Heimforth*, 498 F.2d 970, 971-972 (9th Cir.), *cert. denied*, — U.S. —, 94 S. Ct. 1615 (1974); *United States* v. *Faruolo*, *supra*, 506 F.2d at 493. In the instant case the District Court examined the "totality of circumstances" and determined that, despite appellants' allegations, their consent was voluntary (Finding No. 74). This finding should not be overturned. See, *e.g.*, *United States* v. *Bracer*, 342 F.2d 522, 524-525 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965); *Drummond* v. *United States*, 340 F.2d 983, 988 (8th Cir. 1965); *United States* v. *DuShane*, 435 F.2d 187, 192 (2d Cir. 1970); *United States* v. *Callahan*, 439 F.2d 852, 861 (2d Cir.), *cert. denied*, 404 U.S. 826 (1971).

CONCLUSION

For all of the foregoing reasons, the government urges that the ruling of the District Court is sound and should be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1975— 614—239—208

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 75-1124, 25

UNITED STATES OF AMERICA
APPELLEE

V.

HOWARD M. BRONSTEIN &
DOUGLAS P. PENNINGTON
APPELLANTS

AFFIDAVIT OF SERVICE BY MAIL

LOUIS PINTO, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1967 71ST ST. BROOKLYN, N.Y.

That on the 18TH day of JUNE, 1975, deponent served the within BRIEF FOR APPELLEE upon AARON P. SHITT, ESQ. 242 TRUMBULL ST. HARTFORD, CONNECTICUT 06103

Attorney(s) for the ~~APPELLANT~~ in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me, Louis Pinto

This 18TH day of JUNE 1975

William J. Bachman

WILLIAM J. BACHMAN
Notary Public, State of New York
No. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1976